In the outstanding Office Action, the Examiner has rejected Claims 1-9, 13-16 and 19 relying upon various grounds of rejection, all of which include application of, as the main prior art teaching, U.S. Patent No. 4,964,486 to D'Antonio et al. Co-Applicant D'Antonio herein is co-Applicant D'Antonio in the cited patent. Thus, if the D'Antonio et al. patent is not an appropriate reference for applying against the claims at issue, all of the grounds of rejection including reliance upon D'Antonio et al. must fall. This is, in fact, the case.

Among the claims rejected in reliance upon D'Antonio et al., taken either alone or in combination with other references, are independent Claim 1 and Claims 2-9, 13-16 and 19, each of which depends from independent Claim 1. Independent Claim 1 includes as a specific recitation the following:

> "means receiving sound waves via said front surface for absorbing sound waves below a desired cut-off frequency."

In rejecting independent Claim 1, the Examiner references Figure 18 of D'Antonio et al. and the reference numeral 100.

Figure 18 of D'Antonio et al. depicts a cinder block modular diffusor in one embodiment thereof described as a "full spectrum diffusor viewed from above." See column 3, lines 30-31. The description of Figure 18 may be found in the specification at column 4, beginning at line 63 through column 5, line 21. This description is as follows:

> "Diffusor blocks can be used in conjunction with conventional cinder blocks, concrete or any other suitable massive and stiff building material to form a full spectrum diffusor. These hybrid structures as shown, for example, in FIG. 18 consist of a low frequency diffusor 100 (LFD), which forms the backbone, and diffusor blocks 15, as shown in FIG. 2, placed on the well faces of the LFD. The diffusor 100 has wells 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115 and 116 which may, if desired, be separated by dividers 120. The LFD diffuses low frequencies and the diffusor blocks 15 diffuse mid and high frequencies, thus producing a full spectrum diffusor which can cover an appreciable portion of the audio spectrum. The well widths of the LFD 100 would be approximately 16" to accommodate a diffusor block 15 and the well depths are determined in accordance with TABLE A, with x equal to approximately 8" or more to provide low frequency efficiency. Said another way, the low frequency diffusor 100 is a massive structure with wells 101-116, the depths of which are determined through use of a number theory sequence. The wells 101-116 are large enough to each receive a small diffusor 15 sized and configured to be mounted in wells 101-116, to diffuse mid and high frequencies, thus creating, in conjunction with the low frequency diffusor 100 a full spectrum diffusor."

As should be clear from the above-quoted description, from the specification of the D'Antonio et al. patent, there is absolutely no mention of any sound absorption whatsoever, much less low frequency sound absorption below a desired cut-off frequency as required by Claim 1 and all of the claims dependent therefrom. Looking at the rest of the disclosure of the D'Antonio et al. patent, there is not a single teaching that the invention disclosed and claimed in the D'Antonio et al. patent has anything to do with sound absorption. Each and every aspect of the invention disclosed

and claimed in the D'Antonio et al. patent is directed to sound diffusion.

According to 35 U.S.C. § 102(b), a person shall be entitled to a patent unless:

> "the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States."

Anticipation requires that each and every element of the claimed invention be disclosed in a single prior art reference. *In re Paulsen*, 30 F.3d 1475, 1478-9, 31 USPQ 2d 1671, 1673 (Fed. Cir. 1994), *In re Spada*, 911 F.2d 705, 708, 15 USPQ 2d 1655, 1657 (Fed. Cir. 1990). Alternatively, a claim can be anticipated if each and every element of the claimed invention is embodied in a single prior art device or practice. *Minnesota Mining & Manuf. Co. v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559, 1565, 24 USPQ 2d 1321, 1326 (Fed. Cir. 1992). Here, the Examiner is relying upon a prior art reference rather than a prior art device or practice.

For anticipation, there must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention. *Scripps Clinic & Res. Found. v. Genetech, Inc.*, 927 F.2d 1565, 1576, 18 USPQ 2d 1001, 1010 (Fed. Cir. 1991). As a corollary, absence from the applied reference of any claimed element negates anticipation. *Kloster Speedsteel AB v. Crucible, Inc.*, 793 F.2d 1565, 1571, 230

USPQ 81, 84 (Fed. Cir. 1986). Almost is not enough. A prior art disclosure that almost meets the standard of anticipation may render the claim invalid under 35 U.S.C. § 103(a), but it does not anticipate. *Connell v. Sears, Robuck & Co.*, 722 F.2d 1542, 1548, 220 USPQ 193, 198 (Fed. Cir. 1983).

The rejection of these claims under 35 U.S.C. 102 is improper because the reference relied upon by the Examiner does not include each and every element of the claimed invention. *In re Paulsen*. There is a significant difference between the recitations of independent Claim 1 and the teachings of D'Antonio et al., namely, the claim recites "means receiving sound waves via said front surface for absorbing sound waves below a desired cut-off frequency." Such a means is nowhere taught or suggested in D'Antonio et al. Thus, independent Claim 1 and the claims dependent therefrom are free of anticipation by D'Antonio et al. under 35 U.S.C. 102. *Scripps Clinic & Res. Found.* Almost is not enough.

The Examiner must withdraw the ground of rejection set forth against these claims and issue a Notice of Allowance forthwith.

While Applicant believes that method Claims 20-24 are also patentable, in order to expedite the prosecution of this patent application, those claims have been deleted. However, Applicants reserve the right to file a Continuation Application seeking patent protection on the subject matter of Claims 20-24.

Although this Amendment is presented after a Final Rejection, it should be entered because it reduces the issues that would be present on Appeal by deleting Claims 20-24. No amendments have been made to Claims 1-19 but arguments have been made that should make it clear that the grounds of rejection applied by the Examiner are untenable under patent law. For these reasons, the Amendment should be entered and the application should be promptly passed to issue.

If, for any reason, the Examiner believes that this Amendment does not place the application in immediate condition for allowance, it is respectfully requested that the Examiner telephone Applicants' Attorney locally at (703) 619-0101 so that a personal interview in the Examiner's Office can be promptly arranged.

Respectfully submitted,

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